(2)

Supreme Court, U.S.
FILED
MAY 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1616

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH LOMBARDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

12 pp

QUESTION PRESENTED

Whether petitioner's convictions should be vacated on collateral attack in light of *McNally* v. *United States*, 483 U.S. 350 (1987).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Davis v. *United States*, 417 U.S. 333 (1974)	5
McNally v. *United States*, 483 U.S. 350	2
Stromberg v. *California*, 283 U.S. 359 (1931)	7
United States v. *Angelos*, 763 F.2d 859 (7th Cir. 1985)	6
United States v. *Frady*, 456 U.S. 152 (1982)	5
United States v. *Price*, 857 F.2d 234 (4th Cir. 1988)	7
United States v. *Williams*, 737 F.2d 594 (7th Cir. 1984), cert. denied, 470 U.S. 1003 (1985)	2, 8
United States v. *Zauber*, 857 F.2d 137 (3d Cir. 1988)	7

Statutes:

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508	9
Travel Act, 18 U.S.C. 1952	2
18 U.S.C. 371	1
18 U.S.C. 1343	2
28 U.S.C. 2255	2, 5

Miscellaneous:

134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988)	9

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1616

JOSEPH LOMBARDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 865 F.2d 155. The opinion of the district court (Pet. App. B1-B4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1989. The petition for a writ of certiorari in this civil case was filed on April 3, 1989, and is therefore timely. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1982, petitioner, along with four co-defendants, was convicted on one count of conspiracy to bribe a United States Senator, in violation of 18 U.S.C. 371; one count of interstate travel with the intent to promote bribery, in vio-

lation of 18 U.S.C. 1952; and nine counts of wire fraud, in violation of 18 U.S.C. 1343. Petitioner's conviction was upheld on direct appeal. *United States* v. *Williams*, 737 F.2d 594 (7th Cir. 1984), cert. denied, 470 U.S. 1003 (1985). In 1987, this Court decided *McNally* v. *United States*, 483 U.S. 350, in which it held that the mail fraud statute did not prohibit schemes to defraud citizens of their "intangible right" to honest government services. Pursuant to 28 U.S.C. 2255, petitioner subsequently moved to vacate his convictions in the United States District Court for the Northern District of Illinois. The district court denied the motion. Pet. App. B1-B4. The court of appeals affirmed. *Id.* at A1-A10.

1. Petitioner's convictions arose out of his participation with four co-defendants in a scheme to sell a piece of property located in Las Vegas, Nevada, to then United States Senator Howard Cannon. His co-defendants were Roy L. Williams, the president of the Central Conference of Teamsters; Allen Dorfman, a former special consultant to the Teamsters Central States Pension Fund (the Pension Fund); Thomas F. O'Malley, a trustee of the Pension Fund; and Andrew G. Massa, a former trustee of the Pension Fund.

The Las Vegas property, which was located across the street from Senator Cannon's residence, was owned by the Pension Fund. In late 1978, Senator Cannon and a group of neighbors expressed interest in purchasing the property in order to prevent it from being commercially developed. At that time, legislation designed to deregulate the trucking industry was pending in Congress. The Teamsters strongly opposed that legislation and Senator Cannon, who was the Chairman of the Senate Committee on Commerce, was in a position to affect its future. Seeking to influence Senator Cannon's actions on the legislation, Williams and Dorfman promised to take steps to enable the Senator's group

to purchase the Las Vegas property from the Pension Fund for $1,400,000, to the exclusion of any higher bids. Pet. App. A3.

Williams and Dorfman did not have direct control over the sale of the Las Vegas property, which was known as Wonderworld, because the Pension Fund had agreed in 1977 to turn over control of its assets to Victor Palmieri and Company, a management company, in order to retain its tax-exempt status. Accordingly, in an effort to fulfill their promise to Senator Cannon, the defendants attempted to control the sale of the property by persuading others to withdraw their higher bids. In particular, petitioner proposed to Dorfman that they send O'Malley and Massa to talk to Allen Glick, who had submitted a bid of $1,600,000 for the Wonderworld property. After Williams approved petitioner's proposal, O'Malley and Massa met with Glick and persuaded him to withdraw his bid. Shortly afterwards, Glick persuaded a business partner, Fred Glusman, to withdraw his independent bid of $1,600,000 for the property. Nonetheless, despite the efforts of petitioner and his co-defendants, the Wonderworld property was eventually sold to an unrelated corporation for $1,600,000. Pet. A3-A4.

2. In *McNally*, this Court held that mail fraud convictions could not be based on the theory that public officials' conduct had deprived the citizens of their intangible right to honest and impartial government, which the Court concluded was not a property interest protected by the statute. Thereafter, petitioner moved to vacate his convictions on the ground that his wire fraud convictions had been based solely on a scheme to deprive the Pension Fund of the intangible right to the honest service of its trustees.

The district court denied relief. Pet. App. B1-B4. It observed that "[t]he indictment in this case did not allege a pure intangible right theory of wire fraud" because the defendants "were [also] charged with scheming to defraud the

pension fund of the Wonderworld property itself" (*id.* at B2). The court emphasized that "[t]he indictment alleged two objectives of the scheme to defraud in the conjunctive[] [a]nd the jury instructions required a conjunctive finding" (*ibid.*). The court also pointed out that "[t]he ultimate object of the scheme was the property itself" (*id.* at B4). The court accordingly ruled that "*McNally* dictates no relief" for petitioner because "the indictment alleged and the jury was instructed that in order to convict on [the wire fraud counts] it was necessary for the government to prove beyond a reasonable doubt that the defendants had schemed to defraud the pension fund of tangible property" (*ibid.*).

3. The court of appeals affirmed. Pet. App. A1-A10. The court observed that "[a]lthough the indictment and jury instructions clearly contain language supporting the invalid intangible rights theory of mail [*sic*] fraud, the jury nonetheless was required by the indictment and instructions to find that the defendants schemed to defraud the Pension Fund of property rights protected by the wire fraud statute" (*id.* at A6-A7). The court concluded that "[i]n light of *McNally* and the law of this Circuit, the intangible rights portion of the jury instructions was not prejudicial when viewed in the context of the conjunctive indictment and [the district judge's] conjunctive definition of wire fraud" (*id.* at A8).

The court of appeals rejected petitioner's contention that the scheme was not within the reach of the wire fraud statute because its participants did not seek to obtain something of value for themselves personally, but rather for the benefit of the Teamsters. The court pointed out that "[t]he Pension Fund was no less harmed as a result of defendants' wire fraud scheme to sell the Wonderworld property to Senator Cannon for a bargain price than if the defendants had purchased the property themselves and re-

ceived the benefit of the $200,000 reduction in the price" (Pet. App. A9). The court concluded that "[t]he fact that defendants were depriving the Pension Fund of property for the purposes of securing a benefit of equal or greater value (*i.e.*, the 'appreciation' of Senator Cannon), does not deflect from the reality that the pensioners were being deprived of property without their knowledge by fraudulent means" (*ibid.*).

ARGUMENT

Petitioner's principal contention (Pet. 10-19) is that his wire fraud convictions must be vacated in light of *McNally* because the indictment and the jury instructions charged only a scheme to deprive the beneficiaries of the Pension Fund of their intangible right to the honest services of its trustees.[1] The court of appeals properly rejected petitioner's contention.

In the first place, petitioner's contention completely ignores the fact that the standard of review on collateral attack under 28 U.S.C. 2255 is more stringent than the standard that applies when a defendant challenges his conviction on direct appeal. To prevail on collateral attack, petitioner must demonstrate "actual prejudice" resulting from the error of which he complains. *United States* v. *Frady*, 456 U.S. 152, 168 (1982). Moreover, this Court made clear in *Davis* v. *United States*, 417 U.S. 333, 346 (1974), that a change in the substantive law such as the

---

[1] Petitioner also contends (Pet. 19) that his conspiracy and Travel Act convictions must likewise be vacated because they were closely related to his wire fraud convictions. That contention is frivolous. As the district court stated, "[o]f course *McNally* has no impact upon counts 1 and 2, in which defendants were charged and convicted of conspiracy to bribe a United States Senator and traveling in interstate commerce to facilitate that bribery" (Pet. App. B2).

change made by *McNally* warrants collateral relief only if, under the change in the law, petitioner's conviction could be said to be a "miscarriage of justice." Consequently, petitioner was entitled to collateral relief from his wire fraud convictions only if he showed "that under no possible view of his conduct was he guilty of a federal crime * * *." *United States* v. *Angelos*, 763 F.2d 859, 861 (7th Cir. 1985). That he has not shown. Indeed, petitioner merely alleges error in the indictment and the jury instructions, not that the evidence presented at his trial would not support a wire fraud conviction under proper instructions.

In any event, petitioner's contention that the indictment and the jury instructions charged only a scheme to deprive the Pension Fund beneficiaries of their intangible right to the honest services of its trustees is simply wrong. The indictment and the jury instructions in this case conjunctively charged a single scheme to defraud that had the dual effect of depriving the Pension Fund of both the honest services of its trustees and money or property. As the court of appeals explained, "[t]he jury instructions did not allow conviction based on the intangible rights theory alone nor as an alternative to the money or property requirement" (Pet. App. A8). Moreover, as the court of appeals pointed out, the evidence at trial showed that "[t]he essence of the conduct in which defendants engaged was the attempted sale of the Wonderworld property to Senator Cannon and his neighbors for $1,400,000 in spite of the existence of higher bids for the property" (*id.* at A8-A9). While that scheme deprived the Pension Fund of the loyal services of its trustees, it also "clearly contemplated depriving the Pension Fund of the highest price for the Wonderworld property" (*id.* at A9). Based on the indictment, the evidence, and the jury instructions, the jury therefore necessarily had to find that the scheme to defraud was intended to deprive the Pension Fund of money or property

in order to find that the Pension Fund was deprived of the honest services of its trustees.

For that reason, petitioner's reliance on *Stromberg* v. *California*, 283 U.S. 359 (1931), to support his collateral attack on his convictions is misplaced. *Stromberg* stands for the principle that a conviction based on a general verdict must be reversed if the jury was allowed to find the defendant guilty of the offense based on alternative theories and one of the theories is determined to be invalid.[2] Unlike the situation in *Stromberg*, however, petitioner's wire fraud convictions were not based on alternative theories, because the jury was required to find that the scheme to defraud was intended to deprive the Pension Fund of *both* the honest services of its trustees and money or property. Since the jury was required to find that the scheme to defraud was intended to deprive the Pension Fund of money or property in addition to depriving it of the honest services of its trustes, *Stromberg* is inapposite.[3]

---

[2] In *Stromberg*, the defendant was charged with displaying a red flag in violation of a state law prohibiting such a display for any of three different purposes, one of which was not a valid ground for a conviction. This Court reversed, concluding that since "there were three purposes set forth in the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained" (283 U.S. at 368). In reaching that conclusion, the Court stressed that "in the instructions to the jury, the trial court * * * treated the described purposes disjunctively, holding that the appellant should be convicted if the flag was displayed for any one of the three purposes named," as an "or" connected each purpose (*id.* at 363).

[3] There is likewise no merit in petitioner's claims (Pet. 7-9) that the decision of the court of appeals conflicts with *United States* v. *Price*, 857 F.2d 234 (4th Cir. 1988), and *United States* v. *Zauber*, 857 F.2d 137 (3d Cir. 1988). In *Price*, the union officials were charged only with a scheme to defraud the union of their honest and faithful services,

At bottom, petitioner simply disagrees with the conclusion of both courts below that the indictment and the jury instructions charged that the scheme to defraud was intended to deprive the Pension Fund not only of the honest services of its trustees, but also of money or property. Petitioner's assertion (Pet. 12-17) that both courts misconstrued the indictment, the evidence, and the jury instructions is wholly fact-bound and does not warrant further review.[4]

---

and the court expressly noted that "[h]ad the government charged these defendants with defrauding the union of money, * * * a different result might have been obtained here" (857 F.2d at 236 n.1). Similarly, in *Zauber* the court observed that "it is clear that the mail and wire fraud charges were based, and the jury solely instructed on, an intangible rights theory" (857 F.2d at 144). In addition, *Price* and *Zauber* were decided on direct appeal, and petitioner bears a heavier burden in this collateral attack.

[4] Petitioner also complains (Pet. 4-10) that the decision of the court of appeals denying him collateral relief here is inconsistent with its earlier decision affirming his convictions on direct appeal. That contention is based on a mischaracterization (Pet. 6) of the court's earlier opinion. To be sure, the court in that opinion stated that the indictment "charge[d] only one offense per count—one scheme to defraud the Pension Fund of the loyal services of O'Malley" (737 F.2d at 614). That statement was made in the context of rejecting petitioner's challenge to one jury instruction on the ground that it allowed the jury to reach a non-unanimous verdict (*id.* at 613). Contrary to petitioner's suggestion, however, his unanimity challenge to the jury instruction was not based on any claim that some jurors could find a scheme to defraud the Pension Fund of the honest services of its trustees while other jurors could find a scheme to defraud the Pension Fund of money or property (*id.* at 613-614). In any event, the court made plain its view of the case at the outset of its earlier opinion by observing that "the government's theory of criminal culpability is strikingly clear: the defendants * * * devised and pursued a scheme to bribe a United States Senator at the expense of the Teamsters' Central States Pension Fund" (*id.* at 598).

Finally, Congress recently amended the federal fraud statutes to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. The legislative history of the new provision explains that "[t]his section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988). The scheme in which petitioner was involved in this case would clearly fall within the scope of that new provision. Accordingly, petitioner's contention that his convictions in this case are inconsistent with *McNally* is not a claim that has any prospective importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

MAY 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989 — 241-699/00278